

V.

Civil No. 06-165 Erie  
Criminal No. 02-40 Erie  
Judge Sean J. McLaughlin

In their response, the government cites the well-established rule that, absent extraordinary circumstances, a district court should not consider § 2255 motions while a defendant's direct appeal is pending. See, e.g., Kapral v. United States, 166 F.3d 565, 572 (3<sup>rd</sup> Cir. 1999) (“[D]efendants have long been discouraged from commencing § 2255 proceedings before the conclusion of direct review.”) (citing, e.g., Welsh v. United States, 404 F.2d 333 (5<sup>th</sup> Cir. 1968)); United States v. Robinson, 8 F.3d 398, 405 (7<sup>th</sup> Cir. 1993) (citing United States v. Davis, 604 F.2d 474 (7<sup>th</sup> Cir. 1979); see also Rule 5, Rules Governing § 2255 Proceedings, Advisory Committee Note (1997) (§ 2255 motion “is inappropriate if the movant is simultaneously appealing the decision.”). The

rationale behind the rule is that the disposition of the direct appeal may render the § 2255 motion moot. Robinson, 8 F.3d at 405 (citing Welsh, 404 F.2d 333).

Evaluation of whether extraordinary circumstances exist is left to the sound discretion of the trial judge. Robinson, 8 F.3d at 405. “Whether extraordinary circumstances exist is a question the answer to which depends upon the need for speedy relief against the need for conservation of judicial resources.” Id. (citing Davis, 604 F.2d at 485). Here, Cooley’s claims all relate to routinely raised issues of ineffective assistance of counsel, insufficient evidence, and prosecutorial misconduct. A review of the motion indicates that none of these claims invoke extraordinary circumstances such as to necessitate a deviation from the general prohibition against simultaneously filing a direct appeal and a § 2255 motion. Accordingly, Cooley’s § 2255 motion is dismissed without prejudice to re-file following the resolution of his direct appeal.

UNITED STATES OF AMERICA,

V.

JOHN COOLEY,

Civil No. 06-165 Erie  
Criminal No. 02-40 Erie  
Judge Sean J. McLaughlin

## ORDER

AND NOW, this 15<sup>nd</sup> day of August, 2006, for the reasons set forth above, it is hereby ORDERED that Respondent's Motion to Dismiss is GRANTED and Petitioner's Motion to Vacate Judgment pursuant to 28 U.S.C. § 2255 is DENIED.

IT IS FURTHER ORDERED that, pursuant to 28 U.S.C. § 2253(c), Petitioner has not made a substantial showing of the denial of a constitutional right and is not entitled to a certificate of appealability.

/s/ - Sean J. McLaughlin  
United States District Judge

cm:	All parties of record.
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